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In The

Supreme Court of the United States

October Term, 1982

UNION PROCESSING CORPORATION,

Petitioner,

vs.

MORRIS ATKIN, SOL ATKIN and SAMUEL J. ATKIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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October 31, 1983

Daily Record Corporation
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(10011)

QUESTIONS PRESENTED

(1) Whether the per se rule as applied under § 1 of the Sherman Act to prohibit horizontal competitors from allocating markets requires proof that the entire geographic market has been allocated.

(2) Whether an agreement precluding a competitor from locating an advanced production facility within a territory constitues a form of market allocation that is per se illegal.

(3) Whether under § 1 a belief among competitors that there is "no room" for competition can provide a lawful reason for an arrangement whereby one proceeds with a new facility and pays the other for agreeing not to do so.

PARTIES IN THE COURT OF APPEALS

The parties in this case are as follows:

1. Petitioner is Union Processing Corporation, a New York corporation, Appellant below.

2. Respondents are Morris Atkin, Sol Atkin and Samuel J. Atkin, Respondents below.

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 59 N.Y.2d 919 and is reprinted as Appendix A. The opinion of the New York Supreme Court Appellate Division, Fourth Department, is reported at 90 A.D.2d 332, 457 N.Y.S. 2d 152 and is

reprinted as Appendix B. The unreported opinion of the New York State Supreme Court, Monroe County, is reprinted as Appendix C.

JURISDICTION

The decision of the Court of Appeals was entered on June 28, 1983. On September 19, 1983, the time for filing a petition for writ of certiorari was extended to and including October 31, 1983, by an order signed by Associate Justice Thurgood Marshall. The jurisdiction of this Court is invoked under § 1257(3).

STATUTORY PROVISION INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

This is an action to enforce a contract whereby petitioner Union Processing Corporation agreed to pay two percent of its monthly gross revenues from the sale of shredded metal to respondents for the first seven years of Union's operations. Union has presented the affirmative defense that the real consideration for the contract was respondents' oral covenant not to place a competing scrap shredding operation in the metropolitan Rochester, New York area. The essential facts were established at a trial before the court in the New York State Supreme Court, Monroe County, resulting in written findings of fact and conclusions of law.

Petitioner and respondents are principal factors in the upstate New

York scrap metal business. Respondents, the Atkins, own and operate Genesee Scrap and Tin Baling Corporation (Genesee), one of the largest scrap businesses in upstate New York. Genesee is based in the City of Rochester, in Monroe County. Alan Aroneck, Sanford Aroneck and Aaron Aroneck, the principal owners of Union, also own the leading scrap businesses in Auburn, New York -- approximately 90 miles southeast of Rochester.

In 1974, one of the major trends in the scrap metal business was the increased use of large, high-volume, shredding machines capable of reducing junk automobiles to fragmented metal pellets. These shredders produce a shredded product more attractive to the steel mills than otherwise produced by former methods. A successful shredding

operation depends on the availability of raw materials, i.e., junk automobiles, at inexpensive prices. Accordingly, shredder operations are usually located near large metropolitan areas.

In 1974, two shredder operations were located in Buffalo, New York, and one was located in Syracuse, New York. In the entire area from Buffalo to Syracuse, there were no shredders. Metropolitan Rochester, the fourth largest City in New York State, was considered an ideal location for a new shredder. It had a large population, was protected by distance from existing shredders, and had a sufficient supply of junk cars.

Union ordered a large shredder machine in mid-1974. Shortly thereafter, the Aronecks learned through

industry sources that the Atkins had also ordered a shredder for their Rochester business. The Aronecks promptly contacted the Atkins to try to talk them out of proceeding in direct competition. Both sides were concerned about impending competition for raw materials (junk automobiles) in the Rochester area.

After several meetings, an anti-competitive arrangement was worked out. In consideration for two percent of Union's gross revenues for seven years, the Atkins assigned their shredder order to the Aronecks and agreed not to place a competing shredder in metropolitan Rochester. This basic agreement was reduced to a draft, but the Atkins then became concerned with appearances. The parties sanitized the written agreement, and

the Atkins orally affirmed their promise not to compete in the Rochester area.

Union set up business with the transferred shredder and made the agreed payments through November 1977. In 1978, the parties fell out over a business dispute; Union ceased making payments. When plaintiffs sued, Union disavowed the arrangement, pleading the defense of illegality.

Following a trial without a jury, New York Supreme Court, Monroe County declared the anti-competitive arrangement between Union and Genesee illegal under both the federal and state antitrust laws. The trial court found that the real consideration for the written contract was an illegal agreement not to place a competing shredder in the same market area, which was per se

harmful to the interests of the public at large in the Rochester and Monroe County marketplace.

The trial court expressly rejected the contention that the sanitized writing contained the entire deal or, if it did not, that the restraint was reasonable, as ancillary to the sale of a business. The court found instead that the contract "did not involve the sale, or transfer of the good will, of a going concern."

Finding that the arrangement produced a "business monopoly" with Union as the sole shredder in the Rochester area, protected by plaintiffs' covenants not to enter that portion of the market, the trial Court held this scheme was not justified by any lawful excuse. The trial court held specifically that "[t]he consideration

underlying the written contract between the parties was an illegal and unenforceable oral agreement to restrain competition, in violation of the Sherman Act . . ."

The New York Supreme Court, Appellate Division, Fourth Department, upheld the trial court's findings, noting that great deference should be given to the trial court's evaluation of the credibility of the witnesses. The trial court's findings of fact remained undisturbed.

Of these affirmed findings of fact, the following are particularly significant (Appendix C):

> 10. As a consequence of the said meetings, and negotiations therein, the parties reached an oral agreement whereby Union would accept an assignment of the Newell shredder purchase contract, would reimburse Genesee for its down payment thereon and would pay

Genesee 2% of Union's gross revenues from the metal shredding business for a period of seven years, all in return for Genesee's covenant not to compete in the shredder scrap business in the Rochester area.

11. A written draft agreement, embodying the aforesaid terms, was prepared and presented to plaintiffs in or about December 1974.

12. Plaintiffs refused to sign the said draft agreement because they had been legally advised that their covenant not to compete would be illegal and contrary to public policy.

13. The written contract which was thereafter executed by the parties, and which is presently before the court, was substantially identical to the aforesaid draft agreement, with the notable exception that the former non-competition covenant was supplanted by a specific recitation that neither plaintiffs nor any of their agents or employees had "made any covenant restricting the scope, type, nature or intensity of competition between" Union and the plaintiffs.

14. Contemporaneous with the execution of the said contract

was an oral understanding and agreement between the parties, that, despite the specific contrary recitations of the written contract, plaintiffs would nonetheless abide by their previous oral agreement not to compete with Union in the shredder scrap business in the Rochester area.

15. As of the time that Genesee and Union had independently contracted to buy separate shredders, they were horizontal competitors at the same level of the market structure in the Rochester area. Webb Press Co. v. Bierce, 116 La 905, 41 So 203.

* * *

18. Union had no need for the Newell shredder except as a means to remove Genesee from horizontal competition.

* * *

20. There was no consideration to support Union's acquisition of Genesee's Newell shredder, apart from the assurance that Genesee would not compete with Union in the same business in the same market area.

Although the Appellate Division upheld the trial court's findings, it

proceeded to conclude "on the law" that the anti-competitive agreement was not a per se violation of the Sherman Act, nor was it "unreasonable" under either the Sherman Act or New York's Donnelly Act.

In reaching that result, the court limited its focus to the end-product market (in contrast to raw materials, the real concern of the parties). The court, observing that the end-product market extended across several states, was persuaded that the restraint's anti-competitive impact in that market was not significant. Applying the "rule of reason," the court concluded "it was not improper for an individual to persuade his competition to abandon an enterprise in which both cannot succeed."

In a memorandum decision, the New York Court of Appeals affirmed "for the reasons stated in the opinion" of the Appellate Division. Additionally, the Court of Appeals found no evidentiary support in the record for concluding that the raw materials market, as distinguished from the product market, was limited to the Rochester area.

The federal questions presented by Union have been raised and preserved at every stage of the state court proceedings, starting with its pleadings and continuing with its pre-trial and post-trial briefs. Although Union also argued that the contract was illegal under New York's Donnelly Act (the state analog of the Sherman Act), the federal questions presented here were raised and addressed as well.

REASONS FOR GRANTING THE WRIT

POINT I

WHETHER THE PER SE RULE FORBIDDING MARKET ALLOCATIONS REQUIRES PROOF THAT THE ENTIRE GEOGRAPHICAL MARKET IS ALLOCATED IS AN IMPORTANT FEDERAL QUESTION.

Private anti-trust actions provide an important means of enforcing the economic and social policies underlying the anti-trust laws. The same observation applies where anti-trust laws are raised defensively against illegal contracts. By encouraging parties to disavow illegal contracts, the law tends to discourage anti-competitive conduct that violates the law.

The issue raised in this case is one of prime importance in anti-trust enforcement: how broad is the per se rule prohibiting market allocations?

If only the rule of reason applies when competitors deliberately allocate submarkets, or restrict territories in which each may operate, then an expensive market analysis may be necessary before illegality may be established. This burden can discourage private actions, unless the amounts at stake are very substantial. If a per se rule applies, the proof is direct, since illegality is established once the fact is established that the parties made an arrangement of the type the law forbids.

The New York Court of Appeals, construing and applying the Sherman Act, has held that the per se rule prohibiting market allocations does not apply here - even though the proof established that horizontal competitors deliberately agreed that one would abandon plans to locate a planned

shredder operation in metropolitan Rochester in exchange for monthly payments over seven years. In plain language, one competitor paid another not to compete by locating a similar operation in the same geographical area. The Court of Appeals has held, however, that a per se violation was not established absent a finding that the raw materials market "was limited to the Rochester area to which the agreement of the parties related." In other words, the Court held the per se rule did not apply unless the entire market in which Union operated was allocated.

While the per se rule forbidding market allocations has been established and re-emphasized by the Supreme Court, this Court has never squarely considered the question now presented.

A deliberate agreement by two horizontal competitors to eliminate the competition between them constitutes a naked restraint of trade "with no purpose except . . . stifling of competition," United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972), and this should remain so regardless of the geographical extent of the arrangement. Under the per se rule, such an agreement is conclusively presumed unlawful because of its "pernicious effect on competition and lack of any redeeming virtue . . ." Northern Pacific Railroad Co. v. U.S., 356 U.S. 1, 5 (1958); United States v. Topco Associates, 405 U.S. 596 (1972); United States v. Sealy, 388 U.S. 350, (1967); Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899).

The very purpose of a per se rule is to condemn certain types of agreements or practices which invariably reduce competition, without "elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Railroad Co., supra. Fine distinctions between horizontal market allocations based on their geographic reach conflicts with the major premise of per se illegality, i.e., that "as a matter of practical economics, a substantial adverse affect on interstate commerce results by virtue of the restraint itself." Burke v. Ford, 377 F.2d 901, (10th Cir.), reversed, 389 U.S. 320 (1967); [see also, United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1964) ("[t]he existence of an aggressive,

well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated").]

Under traditional free market analysis, which the federal antitrust laws embody, open competition spurs competitors to innovate and to allocate resources efficiently, thereby serving the public interest. Where, as in this case, collision between competitors is avoided by parceling out exclusive territories, open competition, by definition, does not occur. A market allocation agreement, regardless of whether it encompasses the entire geographic market in which competitors operate, creates a situation where "firms which might have given each

other the competitive nudge have instead agreed to permit to each other an abundant elbowroom". See L.A. Sullivan, Handbook of the Law of Antitrust, § 79 (1977).

Petitioner Union submits that per se principles should apply with equal force to any sub-market or geographical area. The "market allocation" principle should apply even where the parties have made an allocation indirectly (by agreeing not to place an operation in a geographically area) rather than directly (by allocating customers). It also should not matter that the parties, in theory, may locate a facility slightly outside the prohibited area (Appendix C at n. 2). Considerations of this type go to the extent of the illegality - not the more

basic point that such arrangements are always condemned.

These matters all touch issues of public importance. The decision of the New York Court of Appeals, if not reviewed, opens the door for deliberate anti-competitive conduct.

POINT II

THE CONFLICT BETWEEN NEW YORK AND OTHER JURISDICTIONS SHOULD BE RESOLVED.

The decision of the Court below creates a conflict with the analysis and result reached by sister states in applying anti-trust principles in analogous contexts. Although these cases are not recent, the conflict poses a significant obstacle to consistency in the application of the Sherman Act.

In Webb Press v. Bierce, 116 La. 905, 41 So. 203 (1906), two parties contemplating entering a business in a certain location entered into an agreement whereby one would abandon his plans in exchange for $5,000. The Supreme Court of Louisiana refused to enforce the agreement, labeling it a "bald agreement in restraint of trade". The Court held the agreement unlawful, as it suppressed "the 'hot competition' which . . . would have been prejudicial to the interests of [the two competitors] but from which the public might have derived an advantage." 116 La. 905, 912 (1906). Similarly, in Gross-Kelly v. Bibo, 19 N.M. 495, 145 P.480 (1914), the Supreme Court of New Mexico refused to enforce payment on four promissory notes, the

consideration for which was an agreement not to engage in a business in competition with the promisor in a specific location. Unanimously the Court found that "[s]uch an agreement is universally condemned, and held to be contrary to public policy and void . . . ." 145 P. at 489.

In each of these decisions, the state court applied common law principles and did not expressly construe the Sherman Act. Nevertheless, the principles applied are common to the Sherman Act. These decisions indicate that the type of agreement upheld here by New York's highest court, as violating neither the Sherman Act nor New York's Donnelly Act, has been struck down by other courts as violating general anti-trust principles.

POINT III

THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS CONCERNING THE SCOPE OF LAWFUL EXCUSES FOR ANTI-COMPETITIVE ARRANGEMENTS.

The Court of Appeals, by affirming on the basis of the Appellate Division's opinion, has adopted the view that a "reason" for an anti-competitive agreement may be the desire to "persuade [a] competitor to abandon an enterprise in which both cannot succeed." (citing Oakes v. Cattaraugus Water Co., 143 NY 430, 439 (1894)). Given the facts of this case, that means one competitor may pay another not to locate an enterprise in a specified geographical area. This view of the "rule of reason" should be reviewed by this Court.

In circumstances where the per se rule applies, it is well-established that the desire to avoid "ruinous" competition does not excuse deliberately monopolistic agreements between competitors. See, United States Addyston Pipe & Steel Co., 85 F.271 (6th Cir. 1898) aff'd, 175 U.S. 211 (1899) (such agreements void even if designed to keep the competitors "from committing financial suicide by ill-advised competition"). As this Court stated in United States v. Topco Associates, "without territorial restrictions, Topco members may indeed "[cut] each other's throats . . . But we have never found this possibility sufficient to warrant condoning horizontal restraints of trade." United States v. Topco Associates, 405 U.S. 559, 611 (1972). Similar reasoning was adopted

by this Court in United States v. Socony-Vacuum Oil Co., in the context of price-fixing, also per se violative of § 1:

> Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justification. . . . If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would be emasculated. 310 U.S. 150, 220-221 (1939).

As indicated by the decision below, there is a need to consider whether the desire to avoid "ruinous" competition operates as a valid reason for anti-competitive even when "rule of reason" analysis applies. Normally, the "rule of reason" balances the nature of the restraint and the reasons for its adoption against its impact on competitive conditions. E.g., Appalachian Coals,

Inc. v. United States, 288 U.S. 344, 372-74 (1933). When the parties have deliberately restricted competition in exchange for a payment of money, there is nothing to "balance" or declare "reasonable." Unlike an agreement to concentrate competition within certain hours, an arrangement that encourages vigorous competition, e.g., Chicago Board of Trade v. United States, 246 U.S. 231 (1918), the agreement to pay off a competitor does not have redeeming features.

The decision of the court below will open the door for anti-competitive schemes. Competitors are left free to judge for themselves when there may be "no room" for competition, and to secure long-term insulation from competition by paying a small portion of their revenues. If there are two gas

stations at an intersection, it may be easy for one to "persuade" the other that there is no room for competition. The possibilities are limitless, and to avoid any such result the decision below should be reviewed and reversed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

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October 31, 1983

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APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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4 No. 300

Morris Atkin, et al.,

Respondents,

v.

Union Processing Corporation,

Appellant,

et al.,

Defendants.

(and another action.)

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(300) William D. Eggers, Rochester, for appellants. James M. Hartman & Paul J. Yesawich, III, Rochester, for respondents.

MEMORANDUM.

The order of the Appellate Division should be affirmed, with costs, for the reasons stated in the opinion of Justice Reid S. Moule (90 AD2d 332). Additionally we observe that there is no evidentiary support in the record for any finding that the scrap metals/raw materials market (as distinguished from the shredded scrap/products market) was limited to the Rochester area to which the agreement of the parties related.

* * * * * *

Order affirmed, with costs, in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler and Meyer concur. Judge Simons took no part.

Decided June 28, 1983

APPENDIX B

Morris Atkin et al., Appellants, v Union Processing Corporation, Respondent, et al., Defendants. (And Another Action.)

Fourth Department, December 17, 1982

SUMMARY

Appeal from so much of a judgment of the Supreme Court (Edward O. Provenzano, J.), entered January 13, 1982 in Monroe County, as (1) vacated and set aside judgments in favor of plaintiffs against Union Processing Corporation, (2) adjudged a written contract executed by plaintiffs and Union Processing Corporation illegal and void, and (3) dismissed the complaints against Union Processing Corporation.

HEADNOTES

Contracts — Parol Evidence Rule

1. In an action upon a written contract between plaintiffs, owners of a scrap metal business in Rochester, and defendant, which is also in the same business, pursuant to which plaintiffs assigned the purchase contract on a metal shredder to defendant in return for 2% of defendant's gross sales for the next seven years, parol evidence was properly admitted at trial to establish the existence of plaintiffs' oral guarantee not to install a shredder in Rochester, since both parties testified that there were only enough raw materials available in Rochester to operate one shredder profitably and that the purpose of the negotiations was to ensure that only one shredder would operate in the Rochester area; it was up to the trial court to determine the credibility of the witnesses who testified, and the finding that an oral agreement not to compete was part of the

plaintiffs' consideration for the agreement was supported by the record.

Monopolies — Agreement Not to Compete

2. An agreement between two parties, both of whom are in the scrap metal business, providing that only one of them would operate a scrap metal shredder in the Rochester area, is not per se unreasonable under the Sherman Act (US Code, tit 15, § 1 *et seq.*) as a division of the market since the relevant geographic market for the product extends over an area encompassing several States and even if plaintiffs agreed not to set up another shredder in Rochester, they could still effectively compete with defendant by purchasing a shredder and setting it up at another location in New York State. Furthermore, New York's "rule of reason", applicable to every combination or agreement brought under the Donnelly Act (General Business Law, §340), requires consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and the reasons for its adoption, and its impact upon competitive conditions in the relevant market; the agreement's impact upon competition is minimal since plaintiffs can begin operating a shredder anywhere in the relevant geographic market outside of Rochester, competition has not been effectively restricted by the agreement to the detriment of the public interest, and in any event, it is not improper for an individual to persuade his competitor to abandon an enterprise in which both cannot succeed.

APPEARANCES OF COUNSEL

Harris, Beach, Wilcox, Rubin & Levey (James M. Hartman and *Paul J. Yesawich, III,* of counsel), for appellants.

Nixon, Hargrave, Devans & Doyle (William D. Eggers and *Carolyn G. Nussbaum* of counsel), for respondent.

OPINION OF THE COURT

MOULE, J.

The principal question raised on this appeal is whether an agreement between two parties which provided that only one of them would operate a scrap metal shredder in the Rochester area is in violation of either the Sherman (US Code, tit 15, § 1 *et seq.*) or Donnelly (General Business Law, § 340) Acts.

The basis of this action is a written contract made between the plaintiffs, owners of a scrap metal business in Rochester, and defendant which is also in the same business. Both parties purchased and processed scrap metal and resold the processed scrap to steel mills and foundries and were at that time considering the purchase of a metal shredder to process light metal. Steel mills preferred the shredded metal because the shredding process separated ferrous and nonferrous scrap and allowed them to purchase a cleaner grade of scrap. When defendant learned that plaintiffs had placed a down payment on a shredder, it initiated negotiations to ensure that there would be only one shredding operation in the Rochester area. Both sides agreed that there was not enough raw material in the area to support two shredding operations. They eventually reached an agreement whereby plaintiffs assigned the shredder purchase contract to defendant in return for 2% of defendant's gross sales for the next seven years. After one and one-half years had elapsed, defendant ceased making payments under the contract.

Plaintiffs originally brought suit in October, 1978 for judgment allowing them to inspect defendant's books and for the amount they claimed was due under the contract. Defendant raised the affirmative defense that part of plaintiffs' consideration for the contract consisted of an oral restrictive covenant not to operate a shredder in the Rochester area which rendered the contract unenforceable. Plaintiffs' motion for

partial summary judgment was granted by Special Term, which ruled that defendant would not be allowed to prove any oral agreement because

of the contract's integration clause. Defendant appealed and this court reversed, holding that "[p]arol evidence is admissible to show that the consideration for a contract is illegal" (*Atkin v Union Processing Corp.*, 77 AD2d 790, 791). Plaintiffs then moved for a separate trial on the issue of the legality of the contract. After a trial was conducted, the court found that the alleged oral agreement not to compete was part of plaintiffs' consideration for the contract and that, since the agreement was in restraint of competition, it was per se unreasonable and in violation of both the Sherman and Donnelly Acts.

Plaintiffs present two contentions on this appeal. First, that the contract between the parties represents their entire agreement and contains no illegal restraint. Second, that, even if an oral agreement not to compete existed, it was reasonable within the meaning of both the Sherman and Donnelly Acts and, therefore, the contract was enforceable.

[1] Plaintiffs' first contention is without merit. Parol evidence was properly admitted at trial to establish the existence of plaintiffs' oral guarantee not to install a shredder in Rochester (*Atkin v Union Processing Corp., supra*). Both parties testified at trial that there were only enough raw materials available in Rochester to operate one shredder profitably. The parties also agreed that the purpose of the negotiations was to ensure that only one shredder would operate in the Rochester area. The only question on which the parties disagreed was whether plaintiffs had orally covenanted not to operate a shredder in competition with defendant. It was up to the trial court to determine the credibility of the witnesses

who testified. The trial court is in the best position to evaluate the credibility of witnesses and its findings should be given great deference (*Perry v Perry*, 79 AD2d 851; *McCall v Town of Middlebury*, 52 AD2d 736). The record in this case supports the trial court's finding that an oral agreement not to compete was part of plaintiffs' consideration for the agreement.

[2] Plaintiffs next contend that, even if an oral agreement not to compete existed, it was reasonable within the meaning of the Sherman and Donnelly Acts. Assuming

that the Sherman Act was properly asserted in this case,[1] it does not require a finding that plaintiffs' agreement not to compete was illegal as a matter of law. Courts have construed the Sherman Act "as precluding only those contracts or combinations which 'unreasonably' restrain competition" (*Northern Pacific Ry. Co. v United States*, 356 US 1, 5; see, also, *Standard Oil Co. v United States*, 221 US 1; *Chicago Bd. of Trade v United States*, 246 US 231). There are, however, certain agreements which "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" (*Northern Pacific Ry. Co. v United States, supra*, at p 5). These per se unreasonable practices include price fixing (*United States v Socony-Vacuum Oil Co.*, 310 US 150, 210), division of markets (*United States v*

[1]The general question of whether a Federal antitrust statute may be raised as a defense to a contract action in State court is unclear (see *General Aniline & Film Corp. v Bayer Co.*, 305 NY 479; *Remington Rand v International Business Mach. Corp.*, 167 Misc 108; but see *American Broadcasting-Paramount Theatres v American Mfrs. Mut. Ins. Co.*, 42 Misc 2d 939, affd 20 AD2d 890, affd 17 NY2d 849, cert den 385 US 931). Given the context of this case, we need not pass upon this issue.

Addyston Pipe & Steel Co., 85 F 271, affd 175 US 211), group boycotts (*Fashion Guild v Trade Comm.*, 312 US 457), and tying arrangements (*International Salt Co. v United States*, 332 US 392). Defendant argues that the contract it entered into with plaintiffs constituted a division of the market and should, therefore, be found unreasonable per se. Since the oral agreement not to compete between the parties pertained exclusively to the Rochester area,[2] defendant's assertion is correct if the relevant geographic market involved is the Rochester area. The relevant product market in this case consists of steel mills which purchase the end product produced by the shredder. Plaintiffs' unrefuted testimony at trial was that the relevant geographic market for this product extends over an area encompassing several States. Even if plaintiffs agreed not to set up another shredder in Rochester, they could still effectively compete with defen-

dant in this broad geographic market by purchasing a shredder and setting it up at another location in New York State since they would end up selling their end product to the same mills as defendant. This contract is not per se unreasonable under the Sherman Act since it is not a division of the market and, thus, it is necessary to determine whether the competition is "reasonable" under the Sherman Act. New York courts apply the "rule of reason" to every combination or agreement brought before them under the Donnelly Act (*Barns v Dairymen's League Co-op. Assn.*, 220 App Div 624, 640; *State of New York v Milk Handlers & Processors Assn.*, 52 Misc 2d

[2]Defendant admitted at trial that the agreement between the parties would not have prohibited plaintiffs from setting up a shredder in close proximity to Rochester.

658, affd 28 AD2d 971). New York's "rule of reason" and the Federal standard of "reasonableness" are similar standards which look to the same factors in deciding whether a restraint is unreasonable *(State v Mobil Oil Corp.*, 38 NY2d 460, 463). The "rule of reason" requires consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and the reasons for its adoption, and its impact upon competitive conditions in the relevant market (*Optivision, Inc. v Syracuse Shopping Center Assoc.*, 472 F Supp 665, 675 [NDNY]; *Duhamel v Multiple Listing Serv. of Dutchess County*, 108 Misc 2d 67, 71). As discussed previously, the agreement's impact upon competition in the market is minimal since, if they wish to do so, plaintiffs may begin operating a shredder anywhere in the relevant geographic market outside of Rochester. Defendant has made no showing that competition was effectively restricted by this agreement to the detriment of the public interest (*Barns v Dairymen's League Co-op. Assn.*, *supra*, at p 640). Finally, the reason for such an agreement was stated by the Court of Appeals in *Oakes v Cattaraugus Water Co.* (143 NY 430, 439), where it held that it was not improper for an individual to "persuade his competitor to abandon an enterprise in which both cannot succeed". The agreement is not unreasonable and, hence, violates neither the Sherman nor Donnelly Acts.

Judgment in favor of defendant should be reversed and the contract declared valid and not in violation of either the Sherman or Donnelly Acts.

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ATKIN v UNION PROCESSING [90 AD2d 332]

SIMONS, J.P., HANCOCK, JR., CALLAHAN and DOERR, JJ., concur.

Judgment unanimously reversed, on the law, with costs, and judgment granted, in accordance with opinion by Moule, J.

APPENDIX C

DECISION (PROVENZANO, J.) (Pages 8A-14A).

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

MORRIS ATKIN, SOL ATKIN, and SAMUEL J. ATKIN,
Plaintiffs,

vs.

UNION PROCESSING CORPORATION, ALAN ARONECK, SANFORD ARONECK, and AARON ARONECK,

Defendants.

Index No. 4468/79
(Action No. 1)

MORRIS ATKIN, SOL ATKIN, and SAMUEL J. ATKIN,
Plaintiffs,

vs.

UNION PROCESSING CORPORATION,

Defendant.

Index No. 2245/80
(Action No. 2)

APPEARANCES:

WOODS, OVIATT, GILMAN, STURMAN & CLARKE (PERCIVAL D. OVIATT, JR., of Counsel), Attorneys for Plaintiffs, 44 Exchange Street, Rochester, New York 14614

NIXON, HARGRAVE, DEVANS & DOYLE (WILLIAM D. EGGERS, ESQ., of Counsel), Attorneys for defendant Union Processing Corporation, Lincoln First Tower, Rochester, New York 14603

DECISION

EDWARD O. PROVENZANO, J.

Pursuant to an order of Justice Reed of this court, entered on August 19, 1980, the undersigned conducted a non-jury trial to determine the legality of a written contract made between the plaintiffs and defendant Union Processing Corporation in February 1975. The said contract was executed by the plaintiffs on February 12th and by the defendant corporation on February 25th of that month. In the procedural context of this litigation, and based on the oral trial stipulation of opposing counsel and Mr. Oviatt's post-trial letter of April 21, 1981, the issues before the court on the said trial were limited solely to questions of declaratory relief.(*) The matter was submitted for decision without benefit of a stenographic trial transcript. The court's decision is therefore based on its own trial notes, on the credible testimony, on the exhibits received in evidence and on the briefs and proposed findings submitted by both sides.

Findings of Fact

1. At all times herein pertinent, the three plaintiffs were the principal owners and officers of Genesee Scrap and Tin Baling Corporation ("Genesee").

2. Genesee had been an established business in the Rochester, New York area for over 20 years and was engaged in the purchase of ferrous and non-ferrous scrap for resale and ultimate recycling.

(*)Prior to the receipt of evidence, the court granted Mr. Eggers' motion (unopposed) to dismiss the complaint in action no. 1 as against the individual defendants.

3. At all times herein pertinent, Alan Aroneck, Sanford Aroneck and Aaron Aroneck ("the Aronecks") were the principal owners and officers of Union Processing Corporation ("Union"), which they formed early in 1974 for the purpose of entering the metal shredding business in the Rochester area.

4. A metal shredder, also referred to as an automobile shredder, consists of large machinery which crushes junk automobiles and discarded household appliances and separates them into ferrous and non-ferrous fragments. The ferrous fragments represent a valuable "end product" for resale, principally to steel mills.

5. In 1974 there were metal shredders in operation in Buffalo and in Syracuse but there was none in the Rochester area.

6. In the Spring of 1974 plaintiffs believed that a metal shredder could be profitably operated in the Rochester area and that the shredder end product was "the coming type of scrap" which was more acceptable to the steel mills.

7. In the Spring of 1974 Genesee contracted to purchase a Newell shredder and made a 10% down payment of $64,915 toward the purchase price.

8. In August 1974 Union contracted to purchase a Hammermill shredder and made a down payment thereon. At that time, the Aronecks were unaware of plaintiffs' intended entry into the shredding business or of their purchase of the Newell shredder.

9. After they learned of plaintiffs' plans, the Aronecks contacted the plaintiffs and there ensued several meetings and discussions between the parties relative to operation of the metal shredding business. The parties agreed that one shredder could be profitably operated in the Rochester area but that the operation of two shredders would not permit the owners of either to make a profit.

10. As a consequence of the said meetings, and negotiations therein, the parties reached an oral agreement whereby Union would accept an assignment of the Newell shredder purchase contract, would reimburse Genesee for its down payment thereon and would pay Genesee 2% of Union's gross revenues from the metal shredding business for a period of seven years, all in return for Genesee's covenant not to compete in the shredder scrap business in the Rochester area.

11. A written draft agreement, embodying the aforesaid terms, was prepared and presented to plaintiffs in or about December 1974.

12. Plaintiffs refused to sign the said draft agreement because they had been legally advised that their covenant not to compete would be illegal and contrary to public policy.

13. The written contract which was thereafter executed by the parties, and which is presently before the court, was substantially identical to the aforesaid draft agreement, with the notable exception that the former non-competition covenant was supplanted by a specific recitation that neither plaintiffs nor any of their agents or employees had "made any covenant restricting the scope, type, nature or intensity of competition between" Union and the plaintiffs.

14. Contemporaneous with the execution of the said contract was an oral understanding and agreement between the parties that, despite the specific contrary recitations of the written contract, plaintiffs would nonetheless abide by their previous oral agreement not to compete with Union in the shredder scrap business in the Rochester area.

15. As of the time that Genesee and Union had independently contracted to buy separate shredders, they were horizontal competitors at the same level of the market structure in the Rochester area. Cf. *Webb Press Co. v. Bierce,* 116 La 905, 41 So 203.

17. The Hammermill shredder which Union had ordered was comparable to the Newell shredder purchased by Genesee.

18. Union had no need for the Newell shredder except as a means to remove Genesee from horizontal competition.

19. The court judicially notes that public policy recognizes free and unfettered competition as the rule of trade, resting on the premise that the unrestrained interaction of competitive forces will yield (to the public) the best use of our economic resources, the lowest prices, the highest quality and the greatest material progress. See *Northern Pacific Railway Co. v. United States,* 356 US 1; *State v. Mobil Oil Corp.,* 38 NY2d 460; *People v. American Ice Co.,* 120 NYS 443.

20. There was no consideration to support Union's acquisition of Genesee's Newell shredder, apart from the assurance that Genesee would not compete with Union in the same business in the same market area.

21. Genesee's withdrawal from its intended metal shredding operations in the Rochester area, coupled with its oral agreement not to compete, left Union with a business monopoly in the Rochester and Monroe County marketplace.

22. The monopoly thus secured by Union was not achieved through recognized means such as "force of accident" or the competitive process itself, such as by superior skill, superior products, natural advantages or economic or technological efficiency. See *United States v. ALCOA,* 148 F2d 416; *United States v. United Shoe Machinery Corp.,* 110 F Supp 295.

23. The contract between the parties did not involve the sale, or transfer or the good will, of a going concern.

24. The oral restrictive agreement which underlay the written contract between the parties was per se harmful to the interests of the public at large in the Rochester and Monroe County marketplace.

25. In its answer, defendant Union affirmatively pleaded the defense that the contract between the parties was unenforceable because it violated public policy and was in restraint of trade.

Conclusions of Law

The court declares the rights of the parties, as follows:

1. The consideration underlying the written contract between the parties was an illegal and unenforceable oral agreement to restrain competition, in violation of the Sherman Act (15 USC 1 et seq.) and the Donnelly Act (GBL 340).

2. The written contract between the parties was therefore itself illegal and void, in its entirety, and the court will leave the parties thereto where it finds them and neither party may enforce any of its provisions against the other. See *Spivak v. Sachs,* 16 NY2d 163; *Janke v. Janke,* 47 AD2d 445, affd 39 NY2d 786; *American Store Equipment & Const. Corp. v. Jack Dempsey's Punch Bowl,* 174 Misc 436, affd 258 AD 794, affd 283 NY 601.

Submit judgment, as may be appropriate.

Dated: November 17, 1981

/s/ EDWARD O. PROVENZANO
J.S.C.

APPENDIX D — ORDER AND JUDGMENT APPEALED FROM (Pages 5A-7A)

STATE OF NEW YORK — SUPREME COURT
COUNTY OF MONROE

MORRIS ATKIN, SOL ATKIN and SAMUEL J. ATKIN,
Plaintiffs,

vs.

UNION PROCESSING CORPORATION, ALAN ARONECK, SANFORD ARONECK and AARON ARONECK,

Defendants,

Index No. 4468/79
(Action No. 1)

MORRIS ATKIN, SOL ATKIN and SAMUEL J. ATKIN,
Plaintiffs,

vs.

UNION PROCESSING CORPORATION,

Defendant.

Index No. 2245/80
(Action No. 2)

Upon the decision of this Court dated and filed on November 17, 1981, and upon the attached Bill of Costs, it is

ORDERED and ADJUDGED that the judgment in favor of plaintiffs Morris Atkin, Sol Atkin and Samuel J. Atkin against Defendant Union Processing Corporation entered in Action No. 1 on December 5, 1979 in the amount of $100,955.00 is hereby vacated and set aside;

ORDERED and ADJUDGED that the judgment in favor of plaintiffs Morris Atkin, Sol Atkin and Samuel J. Atkin against

defendant Union Processing Corporation entered in Action No. 2 on April 11, 1980 in the amount of $29,494.41 is hereby vacated and set aside;

ORDERED and ADJUDGED that the written contract executed by plaintiffs on February 12, 1975 and by defendant Union Processing Corporation on February 23, 1975 is illegal and void and neither party may enforce any of its provisions against the other;

ORDERED and ADJUDGED that the complaint against defendants Union Processing Corporation, Alan Aroneck, Sanford Aroneck and Aaron Aroneck in Action No. 1 is hereby dismissed;

ORDERED and ADJUDGED that Action No. 2 against defendant Union Processing is dismissed;

ORDERED and ADJUDGED that defendant Union Processing Corporation, 3484 South Union Street, North Chili, New York, recover of Morris Atkin, 220 Monteroy Road, Rochester, New York, Sol Atkin, 240 Thackery Road, Rochester, New York, and Samuel J. Atkin, 100 Thackery Road, Rochester, New York, jointly and severally, the sum of $6,510.69 representing the costs and disbursements of this action.

Dated: January 13, 1982

/s/ EDWARD O. PROVENZANO
Edward O. Provenzano
Justice of the Supreme Court

Judgment entered on January 13, 1982
in the office of the Monroe County Clerk

APPENDIX E — OPINION OF MOULE, J. DATED DECEMBER 17, 1982

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PRESENT: SIMONS, J.P., HANCOCK, CALLAHAN, DOERR, MOULE, JJ.

Morris Atkin. Sol Atkin and Samuel J. Atkin, *Appellants,*

v.

Union Processing Corporation, *Respondent,*

And Another Action.

The above named Morris Atkin, Sol Atkin and Samuel J. Atkin having appealed to this Court from certain parts of a judgment of the Supreme Court, entered in the Monroe County Clerk's office on January 13, 1982 and said appeal having been argued by James Hartman of counsel for appellants, William Eggers of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously reversed on the law, with costs, and judgment is granted as follows:

Ordered and Adjudged, That the contract entered into between the parties is valid and not in violation of either the Sherman or Donnelly Acts.

Opinion by Moule, J., which is hereby made a part hereof.

Entered: December 17, 1982

CARMEN S. LEONE, *Clerk*

SUPREME COURT
APPELLATE DIVISION
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARMEN S. LEONE, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this*

DEC 17, 1982

/s/CARMEN S. LEONE
/s/ *Clerk.*

[SEAL]

APPENDIX F — AMENDED JUDGMENT

STATE OF NEW YORK — SUPREME COURT
COUNTY OF MONROE

MORRIS ATKIN, SOL ATKIN and SAMUEL J. ATKIN,
Plaintiffs,

vs.

UNION PROCESSING CORPORATION, ALLEN ARONECK, SANFORD ARONECK and AARON ARONECK,

Defendants.

INDEX NO. 2245/80
ACTION NO. 1

STATE OF NEW YORK — SUPREME COURT
COUNTY OF MONROE

MORRIS ATKIN, SOL ATKIN and SAMUEL J. ATKIN,
Plaintiffs,

vs.

UNION PROCESSING CORPORATION,

Defendant.

INDEX NO. 2245/80
ACTION NO. 2

Upon the Order of the Appellate Division, Fourth Department, entered December 17, 1982, reversing with costs the judgment entered January 13, 1982 in the Monroe County Clerk's Office in favor of defendant and against plaintiffs, the original judgment, and upon the attached bill of costs, it is

ADJUDGED that the contract entered into between the

parties is valid and not in violation of either the Sherman or Donnelly Acts; and it is further

ADJUDGED that the Order and Judgment entered in the Monroe County Clerk's Office on January 13, 1982 be unanimously reversed on the law; and it is further

ADJUDGED that the judgment in favor of plaintiffs Morris Atkin, Sol Atkin and Samuel J. Atkin against defendant Union Processing Corporation entered in Action No. 1 on December 5, 1979 in the amount of $100,955.00 is hereby reinstated; and it is further

ADJUDGED that the judgment in favor of plaintiffs Morris Atkin, Sol Atkin and Samuel J. Atkin against defendant Union Processing Corporation entered in Action No. 2 on April 11, 1980 in the amount of $28,494.41 is hereby reinstated; and it is further

ADJUDGED that Morris Atkin, 220 Monteroy Road, Rochester, New York, Sol Atkin, 240 Thackery Road, Rochester, New York, and Samuel J. Atkin, 100 Thackery Road, Rochester, New York, recover from Union Processing Corporation, 3484 South Union Street, North Chili, New York, the sum of $130,449.41, together with interest to December 29, 1982 in the amount of $29,070.90, costs and disbursements in the sum of $2,651.76, as shown on the attached bill of costs, amounting in all to the sum of $162,172.07, and that plaintiffs have execution against defendant therefor; and it is further

ADJUDGED that this judgment supersedes the judgment filed with the Monroe County Clerk in these actions on December 28, 1982.

1-3-83

/s/ RICHARD D. ROSENBLOOM,
J. S. C.

Entered in the office of the Monroe County
Clerk on January 3, 1983

APPENDIX G — JUDGMENT

STATE OF NEW YORK — SUPREME COURT
COUNTY OF MONROE

MORRIS ATKIN, SOL ATKIN AND SAMUEL J. ATKIN,
Plaintiff-Respondent,

vs.

UNION PROCESSING CORPORATION, ALAN ARONECK, SANFORD ARONECK AND AARON ARONECK,

Defendant.

ACTION NO. 1

MORRIS ATKIN, SOL ATKIN AND SAMUEL J. ATKIN,
Plaintiffs,

vs.

UNION PROCESSING CORPORATION,

Defendant.

Index Nos. 4468/79 and 2245/80

Upon the order of the Court of Appeals affirming with the costs the order of the Appellate Division, Fourth Department, entered December 17, 1982, and the Amended Judgment entered in the Monroe County Clerk's Office on January 3, 1983, and upon the attached bill of costs it is

ADJUDGED that the order of the Appellate Division Fourth Department, is affirmed with costs; and it is further

ADJUDGED that Morris Atkin, 220 Monteroy Road, Rochester, New York, Sol Atkin, 240 Thackery Road, Rochester, New York, and Samuel J. Atkin, 100 Thackery Road, Rochester, New York, recover from Union Processing

corporation, 3484 South Union Street, North Chili, New York, the costs and disbursements of this action in the sum of $288.18, as shown on the attached bill of costs, and that the plaintiffs have execution against the defendant therefor.

Dated:

/s/ PATRICIA B. ADDUCI,
CLERK

Entered in the office of the Monroe County Clerk on August 5, 1983

83-723

Office-Supreme Court, U.S.
FILED
DEC 30 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

UNION PROCESSING CORPORATION,

Petitioner,

vs.

MORRIS ATKIN, SOL ATKIN, and SAMUEL J. ATKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated: December 30, 1983

QUESTION PRESENTED

Whether an agreement precluding a competitor from locating certain equipment within a small portion of a large geographic market constitutes a *per se* violation of Section 1 of the Sherman Act, on the ground that it is an impermissible division of territories.

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In The

Supreme Court of the United States

October Term, 1983

UNION PROCESSING CORPORATION,

Petitioner,

vs.

MORRIS ATKIN, SOL ATKIN, and SAMUEL J. ATKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In this action, the respondents seek to recover certain commissions which are due as a result of the petitioner's admitted breach of contract. The petitioner ("Union") has refused to pay plaintiffs two percent (2%) of its gross sales of shredded scrap metal, although it agreed to do so in writing. When the respondents sued to enforce the agreement, Union argued that the contract was an illegal restraint of trade and, thus, unenforceable. The non-jury trial below was limited to the question of the legality of the agreement, and the New York Supreme Court, Trial Term, found that the agreement violated both the Sherman and Donnelly Acts and was therefore void. The Appellate Division of the New York Supreme Court, disagreeing, reversed the judgment and declared the contract valid. The New York Court of Appeals affirmed, finding no legitimate antitrust issue.

Many of the central facts are undisputed. In May, 1974, the respondents agreed to purchase a Newell shredder (a device that would reduce automobile hulks and the like to small steel fragments) with the intention of entering the shredded scrap business. For thirty years prior to that time the respondents had purchased scrap metal, processed that raw material, and sold it to steel mills. These raw materials had been processed in a baler, which compressed them and segregated the non-ferrous elements of the product prior to sale. The shredder that the respondents contemplated purchasing differed from the baler in that the finished product was smaller. Both Union and the respondents believed that the product produced by the shredder would, in the future, be more desirable to steel mills than the product produced by balers.

In September, 1974, Sanford Aroneck, Alan Aroneck and Aaron Aroneck, who own Union, contracted to buy a Hammermill shredder so that they too could enter the shredded scrap business in the Rochester area. The Aronecks learned of the respondents' plan to enter the business sometime after they ordered their shredder. The Aronecks then contacted the respondents to discuss their mutual business interests. Both the Atkins and the Aronecks agreed that the Rochester area could not support two shredders and that if both went into the business, neither could survive. Both parties agreed, however, that one shredder could operate profitably, and the respondents suggested that the Aronecks join them in a partnership; however the Aronecks rejected this suggestion out of hand. The Aronecks desired to have the shredder business to themselves and offered to take an assignment of the Atkins' contract to purchase the Newell shredder. The respondents had already made a downpayment of $64,915.00 toward the purchase price of that shredder; the total cost of which was approximately $650,000.00. In contrast, the Hammermill shredder, which Union had contracted to purchase, was to cost approximately $1,000,000.00.

Thereafter there were several meetings between the parties where the potential shredding operation was discussed. As a consequence of these meetings, and the negotiations that ensued, an agreement was reached whereby Union would accept an assignment of the respondents' contract to purchase the Newell shredder, reimburse the Atkins for their downpayment and pay them 2% of Union's gross revenues from the shredding business for the ensuing seven years. The Atkins, however, rejected Union's proposal that a provision be inserted in the contract requiring that the respondents "not . . . compete [with Union] in the Rochester area in the area of shredded scrap."

The parties ultimately memorialized their agreement but the written contract did not contain a covenant by the Atkins not to compete with Union in the sale of shredded scrap. Pursuant to the agreement, Union paid the Atkins 2% of its gross revenues for approximately a year and a half. At that time, however, a dispute unrelated to this litigation arose between the parties, and Union breached the contract, refusing to make the required payments. When the respondents eventually sued to enforce the contract, Union argued that, notwithstanding the plain language of the contract, there was an oral arrangement between the parties, whereby the Atkins agreed not to compete with Union in the shredded scrap business in the Rochester area. According to the petitioners, this arrangement was anticompetitive and voided the contract.

The Atkins denied that any such oral contract existed, but the trial court found to the contrary. The trial judge went on to hold that the oral agreement was "*per se* harmful to the interests of the public at large," and violated the Sherman and Donnelly Acts. On appeal, the Appellate Division found, as a matter of law, that there was no division of territories, and thus no *per se* violation of the antitrust laws. The Appellate Division's conclusion was based upon undisputed testimony that the shredded scrap (the end product produced by the shredder and sold to steel mills) market extended as far east as

Albany, N.Y. and as far west as St. Louis, and included parts of Canada. Even if an agreement not to place a shredder in "the Rochester area" existed, held the court, there was no allocation of markets because the "Rochester area" was not a market and nothing prevented the Atkins from operating a shredder at another location in New York State (or elsewhere) and effectively competing with Union in this broad geographic market. Moreover, there was no allocation of the raw materials market (*i.e.*, the scrap purchased by Union and the Atkins for shredding and resale) because it was undisputed that that market included most of New York State and parts of Pennsylvania. It was also undisputed that even after the agreement was signed the Atkins continued to compete with Union (and others) for these raw materials.

The Appellate Division, employing a Rule of Reason analysis, also held that the "defendant . . . made no showing that competition was effectively restricted by this agreement to the detriment of the public interest."

The New York Court of Appeals affirmed on the opinion of the Appellate Division, adding that "there is no evidentiary support in the record for any finding that the scrap metals/raw materials market (as distinguished from the shredded scrap/products market) was limited to the Rochester area to which the agreement of the parties related."

The petitioner has argued that the Atkins/Union agreement was a horizontal arrangement among competitors that purposely restrained competition in both the shredded scrap market and the raw materials market. According to Union, this contract effected an allocation of both markets to one competitor in exchange for a division of the resulting gross revenues, and was thus a *per se* violation of the Sherman Act. The courts below found (and Union does not deny) that the petitioner made no attempt at trial to show that there was in fact any public injury, or lessening of competition, resulting

from this arrangement. Union thus sinks or swims on whether the agreement between the parties constituted a *per se* violation of the Sherman Act. However, the alleged oral contract did not constitute a prohibited division of markets because it involved the allocation of only a small portion of the relevant geographic market. Petitioner now asks this Court to create a new denomination of *per se* violation to allow it to escape the payment provisions of its contract.

REASONS FOR DENYING THE WRIT

POINT I

Because this Court has already defined the scope of the *per se* rule forbidding market allocations, no important federal question is raised by this appeal.

This Court has long held that one of the classic *per se* violations of Section 1 of the Sherman Act occurs when competitors at the same level of the market structure agree to allocate territories in order to minimize competition. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). This Court has also held that "threatened foreclosure of competition must be in relation to the market affected." *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320, 327 (1961). In order to prove a horizontal division of markets "the competition foreclosed by the contract must be shown to constitute a substantial share of the relevant market." *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320, 328 (1961).

Throughout the litigation, petitioner has claimed that the alleged contract not to compete in the "Rochester area" constituted an impermissible allocation of markets. However, the courts below found that the relevant raw materials and end product markets encompass several states, and are not limited to "the Rochester area." Because respondents were free

to locate a shredder in close proximity to Rochester, or anywhere else in this broad geographic market, the contract did not prohibit respondents from competing effectively in the relevant market.

Now, however, Union asks this Court to change its long-standing rule that a *per se* violation must involve a "substantial share" of the entire relevant market. Contrary to Union's representations, this Court has passed on the question of whether the allocation of a small portion of the relevant market constitutes a *per se* violation of the Sherman Act. In *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320, 327-8 (1961), this Court refused to hold that there was a division of markets where a contract foreclosed competition in "peninsular Florida," when the relevant geographic market was at least seven states in size, and the restraint involved only a small portion of this broader geographic area. 365 U.S. at 331-33. Similarly, in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), exclusive dealings between United States Steel and Consolidated Steel Corporation for rolled steel did not constitute a division of markets where Consolidated possessed only a small share of the relevant market and there was no injury to competition. This Court has made it clear that when applying the *per se* rule to a claimed division of markets, the restraint must affect the entire market, not some isolated portion of it.

Union is really asking this Court to change the law because it is dissatisfied with the lower courts' findings of fact. The New York appellate courts, using their power to review questions of fact (*N.Y. C.P.L.R.* §5501), found that the relevant geographic market was not the "Rochester area," but rather "an area encompassing several States." Faced with this determination, the petitioner cannot prove an illegal restraint in the relevant market, and must resort to asking this Court to change well entrenched, and sound, precedent.

If this Court is inclined to overrule decisions such as *United States v. Topco Associates*, 405 U.S. 596 (1972), and *Tampa Electric Co. v. National Coal Co.*, 365 U.S. 320 (1961), and expand the *per se* doctrine, a dangerous precedent would be set. Nearly every contract, then, could be viewed as restraining trade in a portion of some market, be it a small geographic area or a lilliputian share of a product market. The Sherman Act was intended to prevent restraint of trade in the market place — not between two individuals whose activities will have a *de minimus* effect on potential competitors and consumers. In such cases, the Rule of Reason is adequate protection, and courts can determine on a case by case basis whether a particular contract restrains competition and is illegal. In short, it is difficult to see how petitioner's arguments pose a novel and pressing federal question.

POINT II

There is no conflict between New York and other jurisdictions in this case.

Petitioner also claims that there is a conflict between New York law on this subject and that of other jurisdictions. The "conflict" is imaginary and arises from Union's misinterpretation of a 1906 decision of the Louisiana Supreme Court.

In *Webb Press v. Bierce*, 116 La. 905, 41 So. 203 (1906), the Supreme Court of Louisiana held that an agreement by one party to abandon his plans to enter into a business was illegal under an Oklahoma statute. The statute that was the rudiment of the decision was later described by the Supreme Court of Oklahoma as "arbitrary" and "reflecting medieval economic ideals." *Wesley v. Chandler*, 152 Okla. 33, 3 P.2d 720, 722 (1931). "Medieval" economic ideals are hardly relevant to an analysis of the policies advanced by the Sherman Act.

Petitioner also relies on *Gross, Kelly & Co. v. Bibo*, 19 N.M. 495, 145 P. 480 (1914), where the Supreme Court of New Mexico (relying upon *Webb Press, supra*) held that a contract not to engage in business at an isolated western town (Grants, N.M.), near the turn of the century, was invalid. Even if this case did not involve the allocation of the entire market, it is hardly relevant.

Gross and *Webb Press* represent the thinking of courts at a time when state common and statutory law was more strictly construed to forbid restraints on competition. They have no bearing upon this Court's interpretation of the Sherman Act over the next 70 years. These cases represent a restrictive, even draconian, approach to trade regulation. As the New York Court of Appeals has held:

> At one time in the early history of the common law, such promises were routinely held to be unenforceable, since they were deemed to be violative of the strong public policy in favor of encouraging free trade and discouraging monopolies (*see Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211; 14 Williston, Contracts [3d ed], §§1635-1636). Later, however, the inflexible approach of the judiciary to such agreements was relaxed to some extent as the courts came to realize that a blanket prohibition against agreements purporting to restrain trade was contrary to the equally strong public policy in favor of allowing individuals to dispose of their property freely and to enter into binding contracts. Ultimately, agreements restricting the parties' right to compete were recognized by the courts and were held fully enforceable if the restrictions were found to be "reasonable" in geographic scope and duration.

Mohawk Maintenance Co. v. Kessler, 52 N.Y.2d 276, 283-4, 437 N.Y.S.2d 646, 650 (1980) [some cites omitted].

The superannuated view of cases such as *Webb Press* and *Gross* has become extinct. These cases relate only to the interpretation by each state of law or statutes peculiar to that forum, and not to the interpretation of the Sherman Act.

POINT III

There is no reason to consider whether a new *per se* rule should be developed for this case.

In Point III of its brief, Union invites this Court to wrestle with a confusing argument, *viz.* whether or not under a Rule of Reason analysis a restraint is reasonable where it involves one competitor paying another not to locate in a portion of the geographic market. In the first place, the argument is puzzling because petitioner never offered any proof at trial about the economic impact of the alleged oral agreement by the Atkins not to locate a shredder in Rochester. Thus, no matter what the nature of the restraint, Union could not prevail on a Rule of Reason theory because it did not prove public injury. Because it also cannot prove a *per se* violation, it has no legitimate anti-trust claim.

This argument is a variation on the same theme and is simply another way of asking this Court to create a new category of *per se* violation. In fact, after analyzing this argument we now know what Mark Twain meant when he said: "The more you explain it, the more I don't understand it."

While petitioner claims that the decision below raises significant concerns about the type of excuse which can justify an anti-competitive arrangement, Union did not come forward with any evidence at trial to show that this arrangement did unreasonably restrain trade. If it had, Union might have prevailed on a Rule of Reason theory. The fact is that there was no proof that the agreement restrained trade or injured the public in any fashion, and this issue is hardly one that merits review by this Court.

CONCLUSION

For these reasons, the writ of certiorari requested by petitioner should not be issued.

Respectfully submitted,

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